United States Government
MEMORANDUM

Office of Government Ethics

Subject: Appointment of Judge Frank Q. Nebeker as Director, Office of Government Ethics; Recent Developments in 18 U.S.C. § 207

From: Donald E. Campbell
Deputy Director

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To: Designated Agency Ethics Officials, General Counsels, Inspectors General

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A. OGE HAS NEW DIRECTOR. As you may already know, Senior Judge Frank Q. Nebeker of the District of Columbia Court of Appeals was sworn in on December 11, 1987, as OGE's third full-time Director. He brings a rich background of trial and judicial experience, as well as a strong commitment to legal education and ethics.

After graduation from the American University Law School in 1955, Judge Nebeker served in the Department of Justice as a trial attorney in the Internal Security Division, and as an Assistant U.S. Attorney for the District of Columbia, where he was Chief of the Appellate Division. In 1969, he was appointed to the District of Columbia Court of Appeals, and was reappointed in 1979.

Judge Nebeker's past and ongoing contributions to legal education are legion. He is a founder and current member of the Faculty Advisory Committee for the Judges' Graduate Program in Judicial Process at the University of Virginia; co-chairman and regular faculty member of the ABA's Committee for Continuing Education of the Appellate Judges' Conference Seminar Series; a participant at CLE programs for military appellate court judges; past chairman and current member of the Appellate Advocacy Committee of the Appellate Judges' Conference; and former instructor at the American University Law School in criminal procedure and appellate advocacy.

In addition to membership in the D.C. Bar, Judge Nebeker is admitted to practice before the U.S. Court of Military Appeals, the U.S. Court of Appeals for the Second Circuit, and the Supreme Court of the United States. He is a native of Utah and is married and the father of three adult children.

We look forward to working with Judge Nebeker as he directs expansion of OGE's ethics training program, preparation for this year's congressional reauthorization of OGE, and furtherance of our commitment to a strong ethics program throughout the executive branch.

B. SPECIFIC INTENT NOT REQUIRED UNDER 18 U.S.C. § 207. In a series of pretrial motions, Lyn Nofziger, former Assistant to the President for Political Affairs, and his business partner Mark Bragg, challenged their indictment involving prohibited communications under 18 U.S.C. § 207(a) and (c) on several grounds, including failure to allege specific intent and unconstitutional vagueness. Both motions were denied by the U.S. District Court for the District of Columbia in November 1987, and the trial is now in progress.

Mr. Nofziger faces charges, inter alia, of engaging in prohibited communications with the Counsellor and Deputy Counsellor to the President and with the Army on behalf of Welbilt Electronics Die Corporation (now Wedtech); and Mr. Bragg is charged as an aider and abettor. In its ruling on the specific intent issue, the Court found that, as a public welfare measure designed to promote honest government, 18 U.S.C. § 207 does not require a defendant's "guilty knowledge" of each element; rather, it places the burden on those regulated to discover the basis for liability and to exercise a high degree of caution. A significant determinant in the Court's ruling appears to have been that the Ethics in Government Act established mechanisms for informing government officials of the § 207 requirements: specifically, the Office of Government Ethics and agency advisors (DAEO's).

The defense had argued that the statute's use of the term "knowingly" in subsections 207(a) and (c) revealed a congressional purpose to include specific intent as an element. After opining that the phrase "with the intent to influence" rather than "knowingly" modified the communication clauses under which the defendants are charged, the Court ruled that in either event, the required mental element was consciousness of actions or absence of mistake, not specific intent to violate each element of the offense. To hold that a defendant's understanding of the law was the test of guilt would frustrate enforcement, the Court said, as well as § 207's overall purpose of eliminating even the appearance of misusing public office.

It is especially noteworthy that the Court also found basic fairness in its interpretation under the facts of this particular case, because the defendants had received clear and ample notice of § 207's requirements before leaving government. The role of each DAEO in adequately counselling and informing those leaving the government, especially senior officials, cannot be over-emphasized. Deficiencies in such counselling programs could lead to different future judicial interpretation of § 207's intent requirement.

Defendants also challenged two phrases of subsections 207(a) and (c) as unconstitutionally vague: 1) "direct and substantial interest" of the U.S. (or of the official's former agency) in the subject matter of the communication; and 2) "participated personally and substantially," referring to the official's prior involvement in the specific matter which is the subject of the communication prohibited by subsection (a). The Court found these phrases to have well-understood common meanings, which adequately put defendants on notice, prevented arbitrary enforcement, and avoided unduly inhibiting free speech. Moreover, it found them capable of measurement under an objective, reasonable-person standard. With regard to the phrase "personally and substantially," the Court also cited the Office of Government Ethics' regulatory guidance in 5 C.F.R. § 737.5(d). The Court rejected defendants' challenge that ambiguity was evident from "flip-flopping" interpretations and exceptions; instead, it found these variations to be based on public policy and administrative ease.

The full text of these and related rulings on the pretrial motions can be found in the Memorandum Opinion of the U.S. District Court for the District of Columbia in U.S. v Nofziger and Bragg, No. 87-0309, slip opinion (D.D.C. November 10, 1987).